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PUBLIC.RESOURCE.ORG, INC.

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SACRAMENTO

12 PUBLIC.RESOURCE.ORG, INC.,

13 Petitioners,

14 v.

15 CALIFORNIA OFFICE OF
ADMINISTRATIVE LAW, and the
16 CALIFORNIA BUILDING STANDARDS
COMMISSION

17 Respondents.
18

Case No. 34-2021-80003612

**PUBLIC.RESOURCE.ORG, INC.'S OPENING
BRIEF IN SUPPORT OF PETITION FOR WRIT
OF MANDATE**

Date: December 17, 2021
Time: 10:00 a.m.
Dept: 27
Hon. Steven M. Gevercer

1 **I. INTRODUCTION**

2 Petitioner Public.Resource.Org (“Public Resource”) submitted requests under the
3 California Public Records Act (“CPRA”) to the California Office of Administrative Law
4 (“OAL”) and Building Standards Commission (“BSC”) seeking disclosure of a complete
5 electronic copy of the California Code of Regulations (“CCR”). OAL and BSC denied Public
6 Resource’s request for multiple reasons, but they have not carried and cannot carry their burden
7 of identifying a statutory exemption that justifies nondisclosure.

8 In addition, two private organizations—National Fire Protection Association, Inc.
9 (“NFPA”) and International Code Council, Inc. (“ICC”)—have intervened in this case to block
10 disclosure on the grounds that they own copyrights in parts of California’s laws. But no
11 California law authorizes any entity to own the law by asserting copyright over it. Nor could it, as
12 the government edicts doctrine holds that the law cannot be copyrighted, even when it
13 incorporates portions of works authored or published by private parties.

14 Because OAL and BSC have failed to comply with their obligations under the CPRA,
15 Public Resource filed this petition seeking a writ of mandate commanding them to disclose the
16 CCR in response to Public Resource’s CPRA requests. *See Verified Pet’n for Writ of Mandate*,
17 filed Mar. 17, 2021 (“Pet’n”), at 7–13. The Court should order them to produce electronic copies
18 of the CCR in response to Public Resource’s CPRA requests.

19 **II. BACKGROUND**

20 **A. Parties**

21 Public Resource is a California nonprofit that aims to improve public access to
22 government records and primary legal materials. *See generally* Pet’n at 7–13; *see also*
23 <https://www.youtube.com/watch?v=2tOJdGaMvVw> (explaining Public Resource’s mission).

24 OAL oversees the publication and distribution of the CCR. *Id.* at 8–9. Its purpose is to
25 “ensure that agency regulations are clear, necessary, legally valid, and available to the public.”¹

26 BSC administers California’s building code, coordinates and manages the model code
27 adoption process, reviews and approves building standards, and publishes the California Building

28 ¹ <https://oal.ca.gov/about-the-office-of-administrative-law/>.

1 Standards Code as Title 24 of the CCR. *Id.* at 7, 11.

2 NFPA and ICC are private organizations that coordinate the development of technical
3 standards, which they provide to government entities for incorporation into law. Pet’n at 11; *see*
4 *also* Mot. to Intervene, filed August 27, 2021, at 4–5. Elements of some of the model codes they
5 claim to own have been adopted as California law in Title 24 of the CCR. Pet’n at 11.

6 **B. Facts**

7 In December 2020, Public Resource submitted CPRA requests to OAL and BSC seeking
8 complete electronic copies of the CCR in a structured, machine-readable format. *Id.* at 9–13. Both
9 agencies refused on several grounds. OAL responded that it does not have a structured, machine
10 readable version of the CCR, and that it has an outdated version on a CD-ROM, but each section
11 would need to be individually extracted and copied. *Id.* at 10. BSC responded that print editions
12 of Title 24 are available for inspection at certain public libraries; that it can be purchased in whole
13 or part from certain private entities; and that BSC “does not have the publishing rights to Title 24
14 and therefore cannot provide free copies to the public” because “Title 24 is based on and includes
15 model codes produced by the publishing entities, and they then publish California’s codes,
16 retaining copyright protections.” *Id.* at 12–13. Public Resource responded with letters explaining
17 why OAL and BSC had not provided lawful reasons for refusing to disclose the CCR under the
18 CPRA. *Id.* at 9–13. After OAL and BSC continued to refuse, Public Resource filed its petition
19 with the Court seeking a writ commanding OAL and BSC to respond to its CPRA requests.

20 In May 2021, NFPA and ICC sought to intervene to prevent disclosure of the CCR based
21 on the claim that they own copyrights in parts of California’s laws and that disclosure would
22 infringe their exclusive rights. The Court granted their motion to intervene on August 27, 2021.

23 **III. ARGUMENT**

24 **A. The CPRA requires disclosure of public records.**

25 The California Constitution states that the “people have the right of access to information
26 concerning the conduct of the people’s business, and, therefore, . . . the writings of public
27 officials and agencies shall be open to public scrutiny.” Cal. Const. Art. I § 3(b)(1). The CPRA
28 protects this “fundamental and necessary” right by giving the people a means of enforcing it. Cal.

1 Gov't Code § 6250; *see also* *Cty. of Santa Clara v. Super. Ct.*, 170 Cal. App. 4th 1301, 1335
2 (2009) (the CPRA is designed to “increase[e] freedom of information by giving members of the
3 public access to information in the possession of public agencies”); *CBS, Inc. v. Block*, 42 Cal. 3d
4 646, 651–52 (1986) (“Implicit in the democratic process is the notion that government should be
5 accountable for its actions. In order to verify accountability, individuals must have access to
6 government files.”).

7 An agency must disclose records in response to a CPRA request if (1) the records “qualify
8 as ‘public records’” within the meaning of § 6252(e); and (2) the records are “in the possession of
9 the agency.” *Anderson-Barker v. Super. Ct.*, 31 Cal. App. 5th 528, 538 (2019). All public records
10 are subject to disclosure unless the legislature has expressly provided to the contrary. Cal. Gov't
11 Code § 6253(b). An agency must disclose public records unless the record falls under one of the
12 exemptions listed in the statute. *Id.* Cal. Gov't Code § 6255; *Citizens for A Better Env't v. Dep't*
13 *of Food & Agric.*, 171 Cal. App. 3d 704, 711 (1985) (“Grounds to deny disclosure of information
14 ‘must be found, if at all, among the specific exceptions to the general policy that are enumerated
15 in the Act.’” (quoting *State of Cal. v. Super. Ct.*, 43 Cal. App. 3d 778, 783 (1974))). The agency
16 “opposing disclosure bears the burden of proving that an exemption applies.” *Cty. of Santa Clara*,
17 170 Cal. App. 4th at 1321 (citing *Bd. of Trs. of Cal. State Univ. v Super. Ct.*, 132 Cal. App. 4th
18 889, 896 (2005)); *see also* *L.A. Unified Sch. Dist. v. Super. Ct.*, 228 Cal. App. 4th 222, 239
19 (2014).

20 Public records must be provided by the agency in “any electronic format in which it holds
21 the information” and any format “used by the agency to create copies for its own use or for
22 provision to other agencies.” Cal. Gov't Code § 6253.9(a)(1)–(2).

23 The California Constitution directs that any applicable statute or authority “shall be
24 broadly construed if it furthers the people’s right of access, and narrowly construed if it limits the
25 right of access.” Cal. Const. Art. I § 3(b)(2); *L.A. Cty. Bd. Of Supervisors v. Super. Ct.*, 2 Cal. 5th
26 282, 290–91 (2016). The general policy of disclosure “can only be accomplished by narrow
27 construction of the statutory exemptions.” *Fairley v. Super. Ct.*, 66 Cal. App. 4th 1414, 1419–20
28 (1998).

1 **B. The CCR is a public record.**

2 OAL and BSC have not disputed that the CCR is a “public record,” which the CPRA
3 defines as “any writing containing information relating to the conduct of the public’s business
4 prepared, owned, used, or retained by any state or local agency regardless of physical form or
5 characteristics.” Cal. Gov’t Code § 6252(e). The CCR is a body of law regulating a vast range of
6 public and private conduct in California, and accordingly, there is no doubt that it “relate[s] to the
7 conduct of the public’s business.” *See Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498,
8 1507 (2020) (“Every citizen is presumed to know the law, and it needs no argument to show . . .
9 that all should have free access to its contents.” (internal quotations omitted)).

10 Additionally, California has mandated the creation and maintenance of the CCR. Cal.
11 Gov’t Code § 11342.4 (“[OAL] shall adopt, amend, or repeal regulations for the purpose of
12 carrying out the provisions of this chapter.”); Cal. Health & Safety Code § 18930(a) (“Any
13 building standard adopted or proposed by state agencies shall be submitted to, and approved or
14 adopted by, the California Building Standards Commission prior to codification.”). This fact
15 independently qualifies the CCR as a public record. *League of Cal. Cities v. Super. Ct.*, 241 Cal.
16 App. 4th 976, 987 (2015) (“Any record required by law to be kept by an officer, or which he
17 keeps as necessary or convenient to the discharge of his official duty, is a public record.”).

18 **C. OAL and BSC possess the CCR.**

19 As Public Resource explained in its Petition, OAL and BSC possess the entirety of the
20 CCR. Pet’n at 15–16. BSC has not denied possession, and OAL’s statement that it “does not have
21 a copy of a CCR Master Database” (*id.* at 15 & Ex. D at 31) is contrary to California law.

22 OAL has contracted with West Publishing Corporation (“West”) to publish a copy of the
23 CCR, but OAL maintains possession of its contents. Under that contract, West is tasked with
24 maintaining “the Official California Code of Regulations (CCR) in an electronic database” called
25 “the ‘Master Database.’” Pet’n at 8; Notice of Supplemental Auth. in Support of Petition for Writ
26 of Mandate (“Notice”), Ex. J at 52. West must “update the Master Database as soon as feasible
27 after OAL provides the contractor with regulations that have been endorsed by the Secretary of
28 State, preferably within 15 days but in no event longer than 30 days after OAL delivers the

1 regulation text.” Pet’n at 15; Notice, Ex. J at 52. The contract says that West “shall not alter the
2 text of regulations, notices of any other materials furnished by OAL for publication, except as
3 expressly directed or authorized by OAL.” *Id.* at 59. OAL has the right to “inspect[], revis[e] and
4 correct[]” the CCR Master Database and dictate revisions to West. *Id.* And the contract states that
5 OAL maintains all rights to the Master Database, notwithstanding the fact that West publishes a
6 copy of it. *Id.* at 65.

7 For purposes of the CPRA, California courts define “possession” to “mean both actual and
8 constructive possession.” *Bd. of Pilot Comm’rs v. Super. Ct.*, 218 Cal. App. 4th 577, 598 (2013).
9 Specifically, “an agency has constructive possession of records if it has the right to control the
10 records, either directly or through another person.” *Consol. Irrigation Dist. v. Super. Ct.*, 205 Cal.
11 App. 4th 697, 710 (2012).

12 OAL indisputably “has the right to control” the CCR Master Database. That right is
13 explicitly spelled out in its contract with West. Not only does OAL claim to reserve all
14 intellectual property rights in the CCR Master Database, but it has the exclusive contractual rights
15 to inspect, amend, and revise its contents. Pet’n at 15–16; Notice, Ex. J at 52, 59, 65. OAL
16 therefore has constructive possession of the CCR Master Database under California law.

17 Indeed, the California legislature has explicitly prohibited agencies from avoiding CPRA
18 obligations by outsourcing publication to third parties. Cal. Gov’t Code § 6270(a) states:
19 “Notwithstanding any other provision of law, no state or local agency shall sell, exchange,
20 furnish, or otherwise provide a public record subject to disclosure pursuant to this chapter to a
21 private entity in a manner that prevents a state or local agency from providing the record directly
22 pursuant to this chapter.” Thus, OAL cannot escape its CPRA obligations by asserting that the
23 CCR is in the possession of a private party. *See City of San Jose v. Super. Ct.*, 2 Cal. 5th 608,
24 623–24 (2017) (“The statute’s clear purpose is to prevent an agency from evading its disclosure
25 duty by transferring custody of a record to a private holder and then arguing the record falls
26 outside CPRA because it is no longer in the agency’s possession. . . . It simply prohibits agencies
27 from attempting to evade CPRA by transferring public records to an intermediary not bound by
28 the Act’s disclosure requirements.”).

1 **D. OAL and BSC have not complied with the CPRA.**

2 OAL and BSC have provided no documents in response to Public Resource’s CPRA
3 request. Pet’n at 9–13. Instead, they point to the availability of (1) hard copies at certain public
4 libraries and (2) various online versions available from third parties that carry strict limits on their
5 access and use. Pet’n Ex. D at 35 & Ex. G. As Public Resource explained in its Petition (*see* Pet’n
6 at 18–20), neither response satisfies the agencies’ obligations under the CPRA.

7 First, paper copies are insufficient. The CPRA is clear that “any agency that has
8 information that constitutes an identifiable public record not exempt from disclosure pursuant to
9 this chapter that is in an electronic format shall make that information available in an electronic
10 format when requested by any person.” Cal. Gov’t Code § 6253.9(a).

11 Second, the online versions cited by OAL and BSC are not “publicly available” under
12 California law. These resources are subject to an array of technological and legal restrictions that
13 prevent users from engaging in a variety of lawful activity, including text-searching, copying and
14 pasting, or distributing any of those provisions of the CCR. Pet’n at 20. These “end user
15 restrictions” “are incompatible with the purposes and operation of the CPRA.” *Cty. of Santa*
16 *Clara*, 170 Cal. App. 4th at 1335. Public records must be provided by the agency in “any
17 electronic format in which it holds the information” and any format “used by the agency to create
18 copies for its own use or for provision to other agencies.” Cal. Gov’t Code § 6253.9(a)(1)–(2).
19 BSC and OAL cannot avoid this obligation by pointing to highly restricted versions on third-party
20 websites; they must comply with the statute and provide the records in the formats they
21 themselves possess.

22 **E. No statutory exemption permits OAL or BSC to withhold the CCR.**

23 As explained above, an agency must disclose public records unless the record falls under
24 one of the exemptions listed in the CPRA. Cal. Gov’t Code § 6255; *CBS*, 42 Cal. 3d at 651–52.
25 OAL and BSC have not cited a single exemption to justify withholding the CCR in response to
26 Public Resource’s CPRA requests. Accordingly, they have failed to carry their burden, and the
27 Court should compel them to disclose the CCR. *See Cty. of Santa Clara*, 170 Cal. App. 4th at
28 1321 (the agency “opposing disclosure bears the burden of proving that an exemption applies”).

1 The intervenors, NFPA and ICC, cite two exemptions in their answer—Cal. Gov’t Code
2 §§ 6254(k) and 6255(a)—but neither exemption justifies withholding the CCR. Section 6254(k)
3 exempts records where disclosure is “exempted or prohibited pursuant to federal or state law,
4 including, but not limited to, provisions of the Evidence Code relating to privilege.” And Section
5 6255(a) provides a catch-all exemption that applies when “the public interest served by not
6 disclosing the record clearly outweighs the public interest served by disclosure of the record.”

7 NFPA and ICC appear to argue that both exemptions apply because NFPA and ICC claim
8 copyrights in certain model codes, and elements of those model codes have been incorporated
9 into California law in Title 24 of the CCR. Answer at 11 (“Federal copyright law prohibits
10 Respondents from disclosing Intervenor’s Copyrighted Works in the manner requested.”).
11 Similarly, in its response to Public Resource’s CPRA request, BSC stated that it cannot disclose
12 Title 24 because it contains copyrighted material (although BSC did not identify a statutory
13 exemption that would justify nondisclosure). Pet’n Ex. G.

14 Copyright is not a basis for nondisclosure here. Under the government edicts doctrine, the
15 CCR cannot be copyrighted at all, and therefore no entity owns copyrights in California’s laws.
16 *Georgia*, 140 S. Ct. at 1508 (copyright does not vest in the law and legal materials issued in the
17 name of the state). Title 1 of the CCR states that materials incorporated by reference carry the
18 same weight as regulations in the code itself. Cal. Code. Regs Title 1 § 20(e) (“Where a
19 regulation which incorporates a document by reference is approved by OAL and filed with the
20 Secretary of State, the document so incorporated shall be deemed to be a regulation subject to all
21 provisions of the APA.”). Thus, materials incorporated by reference in the CCR *are* the law, and
22 under the government edicts doctrine, “no one can own the law.” *Georgia*, 140 S. Ct. at 1507.

23 Numerous courts have held that codified laws are unambiguously in the public domain,
24 even when they incorporate elements of model codes authored by private entities. *See, e.g., Am.*
25 *Soc’y for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 451 (D.C. Cir. 2018)
26 (“the express text of the law falls plainly outside the realm of copyright protection”); *Veeck v. S.*
27 *Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791, 793 (5th Cir. 2002) (en banc) (when model codes
28 have been “adopted by a legislative body and become ‘the law,’ . . . the model codes enter the

1 public domain and are not subject to the copyright holder’s exclusive prerogatives”); *Building*
2 *Officials & Code Adm’rs v. Code Tech., Inc.*, 628 F.2d 730, 734 (1st Cir. 1980) (“The citizens are
3 the authors of the law, and therefore its owners, regardless of who actually drafts the provisions,
4 because the law derives its authority from the consent of the public, expressed through the
5 democratic process.”); *Int’l Code Council, Inc. v. UpCodes, Inc.*, No. 17 Civ. 6261 (VM), 2020
6 WL 2750636, at *7 (S.D.N.Y. May 27, 2020) (explaining that “a private party cannot exercise its
7 copyrights to restrict the public’s access to the law” and concluding that a plaintiff “cannot claim
8 actionable infringement based only on Defendants’ accurate posting of the [plaintiff’s codes] as
9 [a]dopted, which are essentially enacted state and local laws”).

10 Moreover, even if California’s laws could be copyrighted (and they cannot), “[s]tate law
11 determines whether [an agency] may claim copyright in [its] office’s creations.” *Cty. of Santa*
12 *Clara*, 170 Cal. App. 4th at 1331; *see also City of Inglewood v. Teixeira*, No. CV-15-01815-
13 MWF (MRWx), 2015 U.S. Dist. LEXIS 114539, at *7–8 (C.D. Cal. Aug. 20, 2015) (“[W]hether
14 state and local governments can claim copyright protection is governed by state law.”). Thus,
15 when an agency asserts copyright as the basis for refusing to disclose records in response to a
16 CPRA request, courts assess whether California law explicitly allows the agency to obtain and
17 assert copyrights in the records in question. *See, e.g., Cty. of Santa Clara*, 170 Cal. App. 4th at
18 1333 (because no “express authorization to secure copyrights” existed for GIS data, the county
19 could not assert copyright protection as a basis for nondisclosure); *City of Inglewood*, 2015 U.S.
20 Dist. LEXIS 114539, at *8–9 (because the city could identify “no affirmative grant of authority
21 that permits it to obtain and assert a copyright for the City Council Videos,” the court held that
22 the city could not withhold the videos on copyright grounds); *Cty. of Santa Clara*, 170 Cal. App.
23 4th at 1335 (holding that the CPRA’s mandate to provide public records “overrides a government
24 agency’s ability to claim a copyright in its work unless the legislature has expressly authorized a
25 public records exemption”). Here, the legislature has not permitted any entity to hold copyrights
26 in the CCR.

27 Accordingly, BSC and OAL cannot assert copyright as a basis for nondisclosure. Because
28 no statutory exemption permits OAL and BSC to withhold the CCR, the Court should compel

1 them to respond to Public Resource’s CPRA request.

2 **IV. CONCLUSION**

3 Public Resource respectfully requests that the Court issue a writ of mandate commanding
4 OAL and BSC to disclose a structured, machine-readable version of the CCR in response to
5 Public Resource’s CPRA requests.

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7 Dated: November 2, 2021

COOLEY LLP

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By: /s/ Matthew D. Caplan

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